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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ANN BROOKE CHRISTENSEN,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
OF MINNESOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Minnesota Statutes § 152.01, Subd. 18, definition of drug paraphernalia, and § 152.093, criminal offense for delivery of drug paraphernalia, are void for vagueness in violation of the United States and Minnesota Constitutions, on their face and as applied, because the statutes do not give fair warning to an ordinary citizen as to what is prohibited criminal activity, and thus fail the notice requirement established by this Court in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc, 455 U.S. 489 (1982)?

2. Whether Minnesota Statutes § 152.01, Subd. 18, definition of drug paraphernalia, and § 152.093, criminal offense for delivery of drug

paraphernalia, are void for vagueness in violation of the United States and Minnesota Constitutions, on their face and as applied, because the statutes do not contain any form of enforcement standards as required by this Court in Village of Hoffman Estates, 455 U.S. 489?

LIST OF PARTIES

The parties to the proceedings below were Petitioner, Ann Brooke Christensen and Respondent, State of Minnesota.

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IN THE
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OCTOBER TERM, 1989

ANN BROOKE CHRISTENSEN,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner Ann Brooke Christensen respectfully prays that this Court issue a writ of certiorari to review the order of the Supreme Court for the State of Minnesota in State of Minnesota v. Ann Brooke Christensen, No. C1-88-2065, entered on June 9, 1989.

OPINIONS BELOW

The order of the Supreme Court for the State of Minnesota in State of Minnesota v. Ann Brooke Christensen, No. C1-88-2065, filed June 9, 1989 and denying Ann Brooke Christensen's Petition for Discretionary Review, is attached to this petition as Appendix A. The opinion of the Minnesota Court of Appeals, No. C1-88-2065, filed May 9, 1989 and reversing the District Court, is unreported, and is attached to this petition as Appendix B. The order and memorandum of the Hennepin County District Court, Fourth Judicial District, State of Minnesota, granting the Motion of Ann Brooke Christensen to dismiss criminal charges against her based upon the challenged Statutes, No. 2151901, filed on September 20, 1989, is

unreported and attached to this petition as Appendix C.

JURISDICTION

The order of the Supreme Court of Minnesota denying Ann Brooke Christensen's Petition for Review was dated and filed on June 9, 1989. Jurisdiction to review the Minnesota Supreme Court's order in this criminal case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1257(1). This petition for writ of certiorari is filed within the 60-day period prescribed by 28 U.S.C. § 2101(d), as computed in accordance with Rules 20.1 and 29.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law". [1/]

The constitutionality of two Minnesota Statutes is in question.

> Minn. Stat. § 152.01, subd. 18,. Drug paraphernalia. "Drug paraphernalia" means all equipment, products, and materials of any kind, except those items used in conjunction with permitted uses of controlled substances under this chapter or the Uniform Controlled Substances Act, which are knowingly or intentionally used primarily in (1) manufacturing a controlled

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[1/] Article 1, Section 7, of the Minnesota Constitution provides in pertinent part: "No person shall be held to answer for a criminal offense without due process of law, . . . nor be deprived of life, liberty or property without due process of law."

substance, (2) injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, (3) testing the strength, effectiveness, or purity of a controlled substance, or (4) enhancing the effect of a controlled substance.

Minn. Stat. § 152.093. Manufacture or Delivery of Drug Paraphernalia Prohibited. It is unlawful for any person knowingly or intentionally to deliver drug paraphernalia or knowingly or intentionally to possess or manufacture drug paraphernalia for delivery. Any violation of this section is a misdemeanor.

STATEMENT OF THE CASE

Nature of the Case

This case presents the substantive question of whether Minn. Stat. § 152.01, Subd. 18, and § 152.093 (1986) meet the due process requirements of the United States and Minnesota Constitutions. Specifically, are Minn. Stat. § 152.01, Subd. 18, definition of drug paraphernalia, and § 152.093, criminal

offense of possession of drug paraphernalia for delivery, void for vagueness because the statutes fail to meet the two prong test established by this Court in Hoffman Estates, 455 U.S. 489: (1) the notice requirement of fair warning to an ordinary citizen of what is prohibited criminal conduct; and (2) the requirement that enforcement standards be included to guide law enforcement and the judiciary. Petitioner raised the question of the constitutionality of the Statutes in a Motion to Dismiss submitted to the District Court on March 2, 1988, arguing the Statutes were unconstitutional on their face and as applied. The Honorable Sean J. Rice, Judge of District Court, granted the Motion and dismissed the charge against Petitioner on September 20, 1988, finding "[t]he definition of drug paraphernalia in Minn. Stat.

§152.01, Subd. 18, fails to give a person of ordinary intelligence a reasonable opportunity to know what conduct is unlawful." App. C, p. 22A at 36A. "Minn. Stat. §§ 152.093 and 152.01, Subd. 18 are unconstitutionally vague on their face and as applied." App. C, p. 23A.

Respondent State of Minnesota timely appealed to the Court of Appeals for the State of Minnesota on September 27, 1988. On May 9, 1989, the Minnesota Court of Appeals ruled that the Statutes do not offend the void for vagueness doctrine and reversed the District Court remanding the matter for trial. App. B, p. 2A. The Minnesota Supreme Court in an Order dated and filed June 9, 1989, declined review. App. A, p. 1A.

Statement of the Facts

Petitioner Ann Brooke Christensen owns InZane, Ltd., which operates InZane,

a retail store located at 7325 Zane Avenue North, Brooklyn Park, Minnesota. InZane sells phonograph records, cassette tapes, posters, tobacco and smoking implements, and jewelry. InZane is licensed as a tobacco retailer for over the counter sales of tobacco and tobacco accessories, snuff and snuff accessories.

On September 17, 1987, officers of the Brooklyn Park Police Department executed a search warrant and seized 119 assorted leather kits and 108 assorted glass and metal tubes. Petitioner was not present at the time. The goods seized are multi-use household objects. The leather kits include, in various configurations, a mirror, small bottle, tubes, razors, and spoons. The tubes are simple tubes, some glass, others metal.

The goods seized were displayed next to snuff, a tobacco product also for sale

in the store. A sign next to the goods seized clearly identified them as tobacco accessories. InZane purchased the goods seized from wholesalers who describe the merchandise in advertising literature and invoices as snuff kits and snuff accessories. Petitioner was not contacted or informed by law enforcement at any time prior to the September 17, 1987 events that any of the items offered for sale in the store were in violation of the law.

On February 22, 1988, Petitioner was charged in Hennepin County District Court with one count of Possessing Drug Paraphernalia for Delivery in violation of Minn. Stat. § 152.093.

The federal question of the constitutionality of the Minnesota Statutes was timely and properly raised so as to give this Court jurisdiction to

review the determinations of the courts below on writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE QUESTIONS THE CONSTITUTIONALITY OF A STATE CRIMINAL LAW WHICH CONFLICTS WITH A DECISION OF THIS COURT DEFINING DUE PROCESS REQUIREMENTS?

This Court clearly defined the constitutional standards for due process which a state drug paraphernalia law must meet in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982).

Petitioner contends, and the District Court held, that Minnesota Statutes, § 152.01, Subd. 18, definition of drug paraphernalia, and § 152.093, criminal prohibition against possession with intent to deliver, are void for vagueness under due process requirements. Petitioner contends the laws are so poorly drafted that no notice is given

her and other retailers of what is prohibited criminal conduct, and no enforcement standards or guidelines are present to direct law enforcement. Thus, Petitioner and other retailers are subject to arbitrary and discriminatory criminal prosecution by law enforcement who must by necessity make subjective decisions as to what is illegal.

A. THIS COURT CLEARLY DEFINED DUE PROCESS STANDARDS FOR STATE DRUG PARAPHERNALIA STATUTES IN HOFFMAN ESTATES.

This Court defined due process standards for state drug paraphernalia laws in Hoffman Estates, 455 U.S. 489. Hoffman Estates upheld a village ordinance licensing and regulating drug paraphernalia from challenge under the vagueness and overbreadth doctrines. 455 U.S. at 505. More demanding standards of specificity normally applicable to criminal laws did not apply to the

regulatory ordinance. 455 U.S. at 500-01.

In Hoffman Estates, this Court established a two prong test to determine if drug paraphernalia laws are constitutional. The first prong of the test is that the drug paraphernalia law must provide notice or fair warning, that is, the law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." 455 U.S. at 498.

The second prong of the test is that the drug paraphernalia law must contain stated within its text, or in supplemental regulations, enforcement standards and guidelines for law officials, prosecutors, and the judiciary. This Court warned that "if arbitrary and discriminatory enforcement

is to be prevented, laws must provide explicit standards for those who apply them." 455 U.S. at 499, quoting, Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

B. CRIMINAL LAWS MUST MEET A HIGHER STANDARD OF DEFINITENESS TO MEET DUE PROCESS REQUIREMENTS.

The Minnesota Statutes Petitioner challenges are criminal laws and thus subject to a higher standard of definiteness than the civil licensing ordinance challenged and upheld in Hoffman Estates.

Petitioner Christensen is charged with a criminal offense. The Minnesota Supreme Court affirmed this Court's rule that:

> [A] statute which provides . . . the basis of a criminal prosecution must meet due process standards of definiteness under the United States Constitution and the Minnesota Constitution. Persons of common intelligence must not be left to guess at the meaning of a statute nor

differ as to its application. Connally v. General Construction, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed.2d 322 (1925). Where a statute imposes criminal penalties, a higher standard of certainty is required. Kolender v. Lawson, 461 U.S. 352, 358, n. 8, 103 S.Ct. 1855, 1859, n. 8, 75 L.Ed.2d 903 (1983).

State v. Newstrom, 371 N.W.2d 525, 528 (Minn. 1985). Thus, Minn. Stat. §152.01, Subd. 18 and § 152.093 must meet a higher standard of definiteness under the due process requirements because Petitioner is subject to criminal prosecution.

This Court has directed state legislatures that the primary burden is on the legislature to assure that the two essential elements of due process, fair notice and fair enforcement standards, be drafted into criminal statutes:

> Although the [vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized more recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine ---- the

> requirement that a legislature establish minimal guidelines to govern law enforcement." Smith v. Goguen, 415 U.S. 566, 574, 94 S.Ct. 1242, 1247-48, 39 L.Ed.2d 605 (1974). Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id., at 575, 94 S.Ct. at 1248.

Kolender v. Lawson, 461 U.S. 352, 358 (1983). The Minnesota Court of Appeals simply declares in a single sentence that sufficient enforcement standards are present. App. B, p. 18A. No citation to or analysis of the alleged enforcement standards within the challenged Statutes is made; nor can it be made. The Statutes contain none. 2/

Because no enforcement standards or guidelines are contained in the text of the Statutes or in supplementary

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2/ See discussion of total absence of any enforcement standards or guidelines at Part II, Section D, below.

regulations, the Minnesota Legislature clearly failed its duty to assure that the criminal laws challenged here were enacted with minimal guidelines or enforcement standards for law officers, prosecutors, and the judiciary. 3/

C. THE MINNESOTA STATUTES ARE VOID FOR VAGUENESS BECAUSE THEY DO NOT GIVE A PERSON OF ORDINARY INTELLIGENCE NOTICE OR FAIR WARNING OF WHAT IS PROHIBITED AS CRIMINAL ACTIVITY.

The essence of due process is that a person have notice or fair warning of

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3/ At the time the Minnesota Legislature enacted the challenged Statutes, the Legislature considered and rejected enacting the Model Drug Paraphernalia Act of the Drug Enforcement Agency. On March 10, 1982, the House of Representative amended S.F. 1758, the originally proposed against conspiring to violate controlled substances law, to include the complete text of the Model Act. On March 11, the Senate rejected the amendment. A Conference Committee drafted the eighteen lines of text enacted as the entire substance of the drug paraphernalia laws for Minnesota. Such was subsequently enacted into law as Chapter 577 of the laws of 1982.

what is prohibited as criminal by the state.

1. Minn. Stat. §152.02, Subd. 18, And §152.093 Are Void For Vagueness For Failure To Provide Notice Or Fair Warning.

The definition of drug paraphernalia at Minn. Stat. § 152.01, Subd. 18 is fatally defective, written in language that is nothing more than a sweeping generalization: "'drug paraphernalia' means all equipment, products, and materials, except . . .". This Court in Hoffman Estates warned that just such language would fail the constitutional requirement of providing fair warning: "a regulation of 'paraphernalia' alone would not provide much warning of the nature of the items regulated." 455 U.S. at 500, n. 17. Neither does the Minnesota definition of drug paraphernalia as "all material, products, and equipment" provide "much warning" of

what objects could be considered 'paraphernalia' causing the citizen to face criminal prosecution for possession.

In holding the Statute unconstitutionally void for vagueness, the District Court recognized the fatal flaw of failure to inform the citizen of what is criminal:

> When a criminal statute is involved, '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Lanzetta v. New Jersey, 206 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed.2d 888 (1939) (footnote omitted).

District Court Memorandum, App. C, p. 27A, citing, High Ol' Times v. Busbee, 673 F.2d 1225, 1229-30 (11th Cir. 1982).

This Court held that the phrase "designed or marketed for use with illegal cannabis or drugs" saved the definition of drug paraphernalia at question in Hoffman Estates from

unconstitutionality. 455 U.S. at 489. The phrases "designed for" and "marketed for" in the definition of drug paraphernalia were held by this Court to afford notice to store owners of what is prohibited. This Court found that the "designed for" standard "encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer." 455 U.S. at 1195. This Court noted that "the alternative 'marketed for use' standard . . . describes a retailer's intentional display and marketing of merchandise." Id.

This language, "designed for" and "marketed for", which saved the village ordinance in Hoffman Estates is not present in the Minnesota Statutes.

In Hoffman Estates the language of that statute, "designed" and "marketed" as drug paraphernalia, was held to establish a criteria of objective evidence of the illegal nature of the object to provide notice to the retailer. Here, the Minnesota Appellant Court erroneously held that the language "used primarily" serves the same due process requirement of notice on the retailer. Even more alarmingly, they hold that whether an object is "used primarily" by an unknown, unidentified portion of some population can be read with Minn. Stat. §152.093 to impute criminal scienter to Petitioner. The Court of Appeals errs, for as the District Court noted, "[r]ather than focusing on what the defendant knows or intends, the statute attempts to define the criminal activity of a retailer as incident to the intent

or knowledge of a third party." App. C, p. 30A.

2. The "Used Primarily" Standard May Not Be Used By The State To Impute Scienter To The Retailer.

The scienter requirement of intent to possess drug paraphernalia for delivery is a necessary element of the criminal statute, Minn. Stat. §152.093. Scienter or criminal intent is included in both Minn. Stat. § 152.01, Subd. 18, the definition of drug paraphernalia, and Minn. Stat. § 152.093, criminal prohibition against possession. Both statutes contain the phrase "knowingly and intentionally".

Minn. Stat. § 152.01, Subd. 18, includes the "used primarily" standard in the definition:

> "Drug paraphernalia" means all equipment, products, and materials of any kind . . . which are knowingly or intentionally used primarily in [a variety of drug related activities].

The inclusion of the phrase "used primarily" renders the statute void for vagueness because the phrase requires the store owner to anticipate whether customers will use purchased goods legally or illegally.

The District Court analyzed whether the definitional section of "this statute is vague since the 'used primarily' standard focuses on the intent or knowledge of the ultimate user of the paraphernalia and not the knowledge or intent of the defendant retailer of the paraphernalia." App. C, p. 29A.

The District Court recognized that the "used primarily" standard offends the constitution because under this standard criminal liability of the retailer hinges on how the majority of purchasers of a multi-use object chose to use it. A retailer cannot be expected to know,

intend, or anticipate whether items with multiple everyday uses will be legally or illegally used by his own customers, much less the population at large.

The District Court found that under the "used primarily" standard in the Minnesota definition of drug paraphernalia, fair notice is not present since the "[d]efendant should not have to guess as to how an item will be used by a purchaser." App. C, p. 32A. The District Court found that "no clear standard for the definition of paraphernalia is set forth in the statute to inform the defendant as to what conduct is prohibited" since "under this definition of paraphernalia, the purveyor of any item, which is ultimately used with a controlled substance, has sold drug paraphernalia." App. C, p. 31A-32A.

The Minnesota Court of Appeals relied on this Court's statement in Hoffman Estates which noted that a "scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant." App. B, p. 11A, quoting, 455 U.S. at 499. The Court of Appeals looked to the fact that the prosecution is required to prove at trial that a defendant such as Petitioner "knowingly or intentionally" delivered drug paraphernalia. The Appellate Court determined that this would avoid "an improper prosecution due to the criminal intent of a retail purchaser." App. B, p. 16A.

The Minnesota Supreme Court and Court of Appeals ignore the fact that after-the-fact proof at trial cannot substitute for the constitutional

requirement that a drug paraphernalia law be drafted with language specific enough to provide notice to the ordinary citizen of what is prohibited criminal activity. [4]/

Because the challenged Minnesota Statutes fail to provide notice to the ordinary citizen, the retail store owner, of what conduct is prohibited, the District Court properly found Minn. Stat. § 152.01, Subd. 18, and § 152.093 unconstitutionally void for vagueness on their face and as applied.

D. THE MINNESOTA DRUG PARAPHERNALIA STATUTES ARE UNCONSTITUTIONAL BECAUSE NO STANDARDS FOR ENFORCEMENT ARE PRESENT.

This Court mandated: "the requirement [is] that a legislature establish minimal guidelines to govern

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[4]/ See Levas and Levas v. Antioch, 684 F.2d 446 (7th Cir. 1982), at Part II, below.

law enforcement." Kolender, 461 U.S. at 358. The second prong of the Hoffman Estates test which a drug paraphernalia law must meet to comply with due process constitutional standards is inclusion in the drug paraphernalia law of enforcement standards or guidelines. 455 U.S. at 503-04.

The District Court in its September 20, 1988, Order did not apply the second prong of the Hoffman Estates test, enforcement standards. The District Court invalidated the Statutes finding violation of the first prong of the Hoffman Estates test, failure to give fair warning.

The Minnesota Court of Appeals did not analyze the second prong of the Hoffman Estates test, enforcement standards. The Minnesota Court of Appeals simply declared: "[t]he statutes

also provide sufficient enforcement standards for law enforcement and the courts and thus satisfy the second prong of the Grayned [Hoffman Estates] test." App. B, p. 17A. A review of Minn. Stat. § 152.01, Subd. 18 and § 152.093 reveals no standards for enforcement. 5/

The legal reasoning of the Appellate Court is a quotation from Hoffman Estates:

> In reviewing a business regulation for facial vagueness * * * the principal inquiry is whether the law affords fair warning of what is proscribed. 455 U.S. at 503.

App. B, p. 17A-18A. The Court of Appeals simply states a circular argument: the statutes provide fair warning and fair

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5/ The entire text of the Minnesota Drug Paraphernalia Act is contained at Appendix D, p. 38A. A review of these Statutes demonstrates that no enforcement standards are present. No implementing or administrative regulations have been enacted by the State of Minnesota containing such guidelines or standards.

warning provides enforcement standards. This is clear error by the Court of Appeals for this Court has defined a distinct two prong test, both parts of which must be met in order for a drug paraphernalia law to meet constitutional due process standards.

The second prong of the Hoffman Estates test establishes a second and independent ground mandating that the statute be declared unconstitutional. The Minnesota Statutes contain no enforcement standards, yet, subjects citizens to criminal prosecution.

This Court declared in Hoffman Estates that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." 455 U.S. at 499, quoting, Grayned v. City of Rockford, 408 U.S. at 108-09.

The rationale requiring enforcement guidelines or standards was defined by this Court:

> "A vague law impermissibly delegates basic policy matters to policemen, judges, and the juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." (footnotes omitted).

455 U.S. at 498, quoting, Grayned, 408 U.S. at 108-09.

The Minnesota Court of Appeals may not hold that the second prong of the Hoffman Estates test is satisfied because "lack of evidence" of "discriminatory enforcement" of the Statutes is present in Petitioner's case. App. B, p. 19A. Petitioner has not yet been tried on the criminal charge. What the Minnesota Appellate Courts chose to ignore is that this Court has held that standards of enforcement must be drafted into the statutes to direct and guide law

enforcement in determining whether a citizen is in violation of the drug paraphernalia laws. The purpose of the second prong of the test, requiring the drug paraphernalia law to be drafted with law enforcement standards is to prevent unequal and improper law enforcement.

The question of arbitrary and discriminatory enforcement is ripe in the criminal prosecution of Petitioner. This stands in contrast to the pre-enforcement challenge to the civil regulatory village ordinance in Hoffman Estates.

This Court in Hoffman Estates warned against the seriousness of due process violation under a criminal law containing no enforcement standards where "the possibility" of arbitrary enforcement "ripens into prosecution." 455 U.S. at 503-04, n. 21. Here Petitioner is

subject to criminal prosecution under the Minnesota Statutes which contain no enforcement standards.

The Minnesota Statutes challenged by Petitioner fail both prongs of the Hoffman Estates test for due process demands. Minn. Stat. § 152.01, Subd. 18, and § 152.093 provide neither notice and fair warning nor contain explicit enforcement standards. Accordingly, the Statutes must be determined to be void for vagueness under the Constitution.

II.

THE DECISION OF THE MINNESOTA APPELLATE COURTS THAT THE STATE DRUG PARAPHERNALIA LAWS ARE CONSTITUTIONAL CONFLICTS WITH FEDERAL APPELLATE AND OTHER COURT DECISIONS APPLYING HOFFMAN ESTATES.

In order to withstand constitutional challenge of being void for vagueness in violation of the due process clause, a drug paraphernalia law must meet both prongs of the Hoffman Estates test. To assist states in drafting drug paraphernalia laws within constitutional parameters, the Justice Department's Drug Enforcement Agency drafted the Model Drug Paraphernalia Act (1979). The majority of states patterned their drug paraphernalia laws on the Model Act, particularly after this Court's admonition in Hoffman Estates of the need for a definition giving notice and for explicit enforcement standards.

Under the first prong of the Hoffman Estates test, the Model Act is not void for vagueness because fair warning of what is prohibited is given the ordinary citizen through a three part, very specific definition of drug paraphernalia. The Model Act definition includes a section stating twelve exemplary categories of what is drug paraphernalia. The twelfth category contains another listing of thirteen objects or "common forms" of drug paraphernalia.

The second prong of the Hoffman Estates test, a explicit statement of standards for law enforcement, is met through the Model Act's definitional section listing fourteen factors which courts or law enforcement may consider in applying the law to determine whether a specific object is drug paraphernalia.

A. THE MINNESOTA STATUTES ARE NOT BASED ON THE MODEL DRUG PARAPHERNALIA ACT.

The State of Minnesota argued that the Minnesota Statutes challenged here are based on the Model Act, thus seeking to bolster the defective meagerness of the actual language. The Court of Appeals stated: "Minnesota's statutes are, at best, only loosely based on the Model Act." App. B, p. 14A. The Minnesota Legislature failed to draft into the Statutes the essential elements necessary to comply with the due process requirements of Hoffman Estates, whether based on the Model Act or otherwise. The absence of a definition of drug paraphernalia specific enough to provide notice or fair warning and of the enforcement standards render the Minnesota laws void for vagueness under the due process clause of the Constitution.

Virtually all published decisions upholding drug paraphernalia laws as constitutional apply the two prong test established by this Court in Hoffman Estates to statutory language originating in the Model Act and find the tests are met and due process requirements satisfied. Casbah, Inc. v. Thon, 651 F.2d 551, 555 (8th Cir. 1981) (Nebraska Legislative Bill 991 "is based on the Model Drug Paraphernalia Act"), reh. denied, 456 U.S. 950; Garner v. White, 726 F.2d 1274, 1278 (8th Cir. 1984) ("Act 78 is virtually identical to the Model Drug Paraphernalia Act"); Levas and Levas v. Antioch, 684 F.2d 446, 449 (7th Cir. 1982) ("The Village of Antioch has enacted the Model Drug Paraphernalia Act."); New England Accessories Trade Ass'n v. Tierney, 691 F.2d 35 (1st Cir. 1982) ("an act patterned on the Drug

Enforcement Administration's Model Drug Paraphernalia Act"); Tobacco Accessories and Novelty Craftsmen Merchants Ass'n v. Treen, 681 F.2d 378, 380 (5th Cir. 1982) ("The Louisiana Act is patterned after the Model Drug Paraphernalia Act"); General Stores v. Bingaman, 695 F.2d 502, 503 (10th Cir. 1982) ("patterned after the Model Drug Paraphernalia Act"); Florida Businessmen for Free Enterprise v. City of Hollywood, 673 F.2d 1213, 1216 (11th Cir. 1982) ("The state head shop law . . . is modelled after the Model Drug Paraphernalia Act").

The Court of Appeals correctly stated that: "[a]s a general proposition, most of the statutes/ordinances based on the Model Act were upheld; those not so based were struck down." App. B, p. 13A. The Appellate Court continued: "we hold that a statute need not be based on the

Model Act to be found constitutional, it merely must meet the standard set forth in Hoffman." App. B, p. 14A. The Court of Appeals conceded that "Minnesota's statutes are, at best, only loosely based on the Model Act." App. B, p. 14A.

In reality, the Minnesota Statutes are constitutionally defective for failure to contain the very two elements of the Model Act which meet the constitutional due process requirements of Hoffman Estates.

The State of Minnesota argued that the Minnesota Statutes comprising the state's entire drug paraphernalia law was based on the Model Act. This is not true. The Minnesota Legislature considered and rejected the Model Drug Paraphernalia Act as a pattern for the

State law. 6/

The Minnesota laws do not contain the elements of the Model Drug Paraphernalia Act which structure the Act to withstand constitutional challenge - (a) a lengthy definition including two separate exemplary listings of objects and (b) detailed standards and guidelines for law enforcement. The Model Act exemplary listings in the definition of drug paraphernalia satisfy the first prong of Hoffman Estates by providing notice of what is prohibited. The Model Act standards and guidelines for law enforcement satisfy the second prong of Hoffman Estates by preventing arbitrary and discriminatory enforcement.

6/ See footnote # 3, above. A review of the entire text of the Minnesota Drug Paraphernalia Act at Appendix D demonstrates the fact that the Minnesota Statutes are not patterned on the Model Act.

The text of the Model Act contains two major parts, (a) a definition of drug paraphernalia and (b) a section stating the substantive criminal offenses. The Model Act definition of drug paraphernalia contains three parts: (1) the definition, (2) an exemplary and non-exhaustive list of objects called "common forms" of drug paraphernalia, and (3) a list of fourteen relevant factors which are indicators if whether a particular object is drug paraphernalia.

The Minnesota Statute is similar to the Model Act only in the statement of the definition. Both include the language: "'drug paraphernalia' means all equipment, products and materials of any kind". Minn. Stat. §152.01, Subd. 18.

The Minnesota Appellate Courts in the present case have upheld this as

providing both fair notice and enforcement standards. An examination of what is missing - of what the Model Act contains that enables statutes drafted based on it to withstand constitutional challenge - will demonstrate the fatal defects in the Minnesota Statutes Petitioner challenges as void for vagueness.

Minn. Stat. § 152.01, Subd. 18 does not contain the non-exhaustive list of exemplary objects which are "common forms of drug paraphernalia:

(1) Kits . . for planting and processing. . .,
(2) Kits for manufacturing . . .,
(3) Isomerization devices . . ,
(4) Testing equipment . . .,
(5) Scales and balances . . .,
(6) Diluents and adulterants . . .,
(7) Separation gins and sifters . .,
(8) Blenders, bowls, containers, spoons and mixing devices . . .,
(9) Capsules, balloons, envelopes and other containers . . .,
(10) Containers and other objects . .,
(11) Hypodermic syringes, needles . .,

(12) Objects . . . such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
(b) Water pipes;
(c) Carburetion tubes and devices';
(d) Smoking and carburetion masks;
(e) Roach clips, meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
(f) Miniature cocaine spoons and cocaine vials;
(g) Chamber pipes;
(h) Carburetor pipes;
(i) Electric pipes;
(j) Air-driven pipes;
(k) Chillums;
(l) Bonds;
(m) Ice pipes or chillers.

Article I, Definitions, Model Drug Paraphernalia Act (1979). A reading of the list of "common forms" of drug paraphernalia above clearly demonstrates the element of "notice", provided by a statute based on the Model Act. Due process is achieved. The definitional list of the Model Act provides clear

notice to retailers such as Petitioner of what objects are prohibited as illegal drug paraphernalia. In contrast, Minnesota's "all equipment, products, and materials" standing alone without the definitional listing is woefully defective in providing fair warning.

The Model Act also meets the second prong of the Hoffman Estates test by providing enforcement standards. Minnesota Statutes contain none of the relevant factors to be considered by law enforcement which are included in the Model Act definition of drug paraphernalia:

> (1) Statements by owners . . .;
> (2) Prior convictions . . . of an owner . . .;
> (3) The proximity of the object . . . to a direct violation of this Act;
> (4) The proximity of the object to controlled substances;
> (5) The existence of any residue of controlled substances . . .;
> (6) Direct or circumstantial evidence of intent . . .;

(7) Instructions, oral or written .;
(8) Descriptive materials . . .;
(9) National and local advertising .;
(10) The manner . . . displayed for sale . . .;
(11) [is the owner] a licensed distributor . . . of tobacco products . . .;
(12) . . . ratio of sales . . .;
(13) . . . legitimate uses . . .;
(14) Expert testimony . . ..

Model Drug Paraphernalia Act (1979). Drug paraphernalia laws patterned on the Model Act satisfy the Hoffman Estates two prong test. This very analysis demonstrates the measure by which the Minnesota Statutes fail to meet the Hoffman Estates standards.

The Minnesota Court of Appeals in upholding the Statutes criticized the District Court, declaring the District Court "imposes a more exact and precise standard than constitutional law requires." App. B, p. 16A. The Court of Appeals in essence substitutes no standard for the preciseness required by

Hoffman Estates.

The Court of Appeals acknowledges the direction this Court provided in Hoffman Estates: "less precise enactments are more likely to be tolerated in the civil context than in the criminal due to the consequences of imprecision". App. B, p. 11A, citing, 455 U.S. at 499. The Minnesota Appellate Court then chooses to ignore the fact that this is a criminal prosecution of Petitioner by citing to this Court for the proposition that: "absolute precision in drafting is not required." App. B, p. 11A, citing, 455 U.S. at 499. Petitioner is not asking that this Court hold the Minnesota Statutes to a standard of "absolute precision", but rather asks that this Court hold that in order to provide notice and explicit enforcement standards more is demanded than the few

sketchy words of the Minnesota Statutes constituting the State's Drug Paraphernalia Act. See Appendix D.

The Minnesota Court of Appeals holds that the definition of drug paraphernalia, Minn. Stat. §152.01, Subd. 18 meets the first prong of the Hoffman Estates test and provides notice and fair warning. The Court of Appeals states:

> [i]n our view a person of ordinary intelligence would know what type of object is referred to in the statute, thus the statute provides the constitutionally required notice.

App. B, p. 16A. The Court of Appeals would assume that a person "knows" what drug paraphernalia is and that the failure to comply with the constitutional due process requirement of having the State Statute afford notice of what is prohibited criminal activity is meaningless. The view of the Minnesota Court of Appeals turns Hoffman Estates on

its head.

The Minnesota Court of Appeals' attempt to justify the vague and extremely abbreviated language of the Minnesota drug paraphernalia Statutes is total err under Hoffman Estates. Further, the failure of the Minnesota Legislature to include the essential elements of the Model Act which provide fair notice, the exemplary listing, and the standards for enforcement render the law void for vagueness under the due process clause of the Constitution.

B. IN UPHOLDING THE STATUTES AS CONSTITUTIONAL, THE MINNESOTA COURTS CONFLICT WITH DECISIONS OF THE FEDERAL COURTS OF APPEALS AND OTHER COURTS.

Although a drug paraphernalia law need not be based on the Model Act to meet constitutional requirements, those laws which are drafted based on the Model Act are uniformly upheld.

The Minnesota Court of Appeals cited the Seventh Circuit for the proposition:

> [A] finding of unconstitutional vagueness cannot be based on uncertainty at the margins, or on a parade of bizarre hypothetical cases: problems of that order can be resolved in challenges to the ordinance as applied.

App. B. p. 12A, quoting, Levas and Levas v. Antioch, 684 F.2d at 451. Petitioner is presently under criminal charges under the Statutes in question; this cannot be considered a "bizarre hypothetical case."

The Seventh Circuit in Antioch demonstrates an understanding of this Court's reasoning in Hoffman Estates which the Minnesota Appellate Courts lack:

> There is a large, but not entirely, amorphous class of items that can be paraphernalia, and an intent requirement that differentiates innocent transfers of multi-purpose items from illegal transfers of drug paraphernalia. That combination satisfies the fair notice aspect of the vagueness test, even in its strictest form.

684 F.2d at 452-53. The Seventh Circuit emphasized that the law must contain an intent requirement that differentiates innocent transfers of multi-purpose items from illegal transfers of defined and identified drug paraphernalia. The Minnesota Court of Appeals ignores this precept.

The Antioch Court also recognized that where a drug paraphernalia law "lack[s] even an illustrative definition of paraphernalia . . . the intent requirement could only be interpreted in the circular, non-clarifying sense." 685 F.2d at 453.

The Seventh Circuit in Antioch stresses that:

> [T]he violator must design the item for drug use, intend it for drug use, or actually employ it for drug use. . . . So long as a violation of the ordinance cannot be made out on the basis of someone other than the violator's knowledge, or on the basis

> of knowledge the violator ought to have had but did not, this sort of intent will suffice.

684 F.2d at 453. Yet, Minn. Stat. §152.01, Subd. 18, by employing the phrase "used primarily" violates this legal standard by having a person such as Petitioner held liable depending on how an object alleged to be drug paraphernalia is "used primarily" by a segment of the population.

Similarly, the Fifth Circuit has recognized that: "[n]o item bears the stigma of drug paraphernalia absent the seller's intent that it be used with a controlled substance." Tobacco Accessories v. Treen, 681 F.2d at 383.

The Court of Appeals' answer to the challenge that Minn. Stat. §152.01, Subd. 18 is defective because the definition of drug paraphernalia lacks any substance or illustrations is to declare a "scienter

requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant." (Emphasis added). App. B, p. 11A, citing, 455 U.S. at 499. The scienter requirement may mitigate vagueness, but can not where the defects are as serious as in the Minnesota Statutes.

The Eighth Circuit, in Casbah, Inc. v. Thon, 651 F.2d 551, and Garner v. White, 726 F.2d 1274, also applies vagueness and overbreadth standards for reviewing drug paraphernalia, and finds Model Act language constitutional.

Casbah upheld the Nebraska Drug Paraphernalia Statute patterned on the Model Act. The Eighth Circuit found the Nebraska Act withstood a challenge on the basis of being overbroad and vague by reviewing the manner in which the Nebraska Act / Model Act satisfied the

requirements of the due process clause of the Constitution.

Garner upheld the Arkansas criminal statutes governing drug paraphernalia. The Eighth Circuit in Garner followed this Court's analysis in Hoffman Estates outlining the due process requirements for fair notice to uphold the law.

The Eighth Circuit, in Garner, reviewed other cases addressing the constitutional validity of drug paraphernalia laws and noted that where the exemplary listings in the definition of drug paraphernalia and the enforcement standards were absent, the statute was void for vagueness:

> Discriminatory enforcement claims were rejected on the ground that examples and relevant factors included in the Model Act as useful in identifying drug paraphernalia provided sufficient guidance for authorities to apply the Act in a non-arbitrary fashion, e.g., General Stores v. Bingaman, 695 F.2d 502 (10th Cir. 1982).

726 F.2d at 1296. The Eighth Circuit looked to this Court for guidance on the void for vagueness question and found that Hoffman Estates "makes it clear that, absent a law totally lacking in enforcement standards, the possibility that a law which regulates business behavior will be arbitrarily enforced 'is of no due process significance unless the possibility ripens into a prosecution.'" 726 F.2d at 1280, citing, 455 U.S. at 503-04, n. 21. The Minnesota Statutes challenged here are criminal laws "totally lacking in enforcement standards." The question of the constitutionality of a criminal law containing no enforcement standards is ripe since the criminal charge against Petitioner presents significant due process questions.

Both Eighth Circuit cases, Casbah and Garner, illustrate a legal analysis of the due process notice requirement of fair warning which is ignored by the Minnesota Appellate Courts.

The Eleventh Circuit upheld a Georgia drug paraphernalia statute which was not based on the Model Act in High Ol' Times v. Busbee, 673 F.2d 1225 (11th Cir. 1982). The Georgia Statute under consideration defined drug paraphernalia as a "drug related object" which is "designed" for use with controlled substances. The "designed for" and "marketed for" language was the focus of this Court's holding in Hoffman Estates that the law in question there was not void for vagueness since those phrases required that the outward physical appearance of the object give notice that they are intended to be used with illegal

drugs. Neither phrase upheld in the Georgia Statute occurs in the Minnesota Statutes.

The Minnesota District Court appropriately cited High Ol' Times for the standard of review which must be applied in determining whether a non-Model Act law, such as Minnesota's, is vague in violation of the Constitution. App. C, p. 26A-28A. The standard of review applied by the Minnesota District Court under High Ol' Times is in essence that of Hoffman Estates as cited in Grayned, 408 U.S. at 108.

Decisions of several federal district courts also illustrate the proper application of this Court's standard in Hoffman Estates which the Minnesota Appellate Courts failed to correctly follow. These case examined the second prong of the Hoffman Estates

test, the explicit law enforcement standards in circumstances where the statutory guidelines were sparse but certainly not non-existent as in the Minnesota Statutes.

The absence of guidelines for enforcement was found to render an ordinance unconstitutionally void for vagueness in Philman's, Inc. v. City of West Carrollton, 577 F.Supp. 1380 (S.D. Ohio 1983). The District Court acknowledged this Court's requirement that law enforcement standards be stated in the law and held:

> Given the importance attached to such guidelines by the Hoffman Estates decision . . . the absence of such guidelines renders the West Carrollton Ordinance invalid on constitutional grounds.

577 F.Supp. at 1388. The District Court also affirmed "the importance and necessity of defining 'paraphernalia' and other words of an ordinance, through

interpretive guidelines or otherwise." 577 F.Supp. at 1389.

The Minnesota Appellate Courts are in conflict with the decisions of the federal courts of appeals and other courts and have failed to properly apply the legal analysis. The Court of Appeals notes that it "has also considered the public policy behind the statutes; drug trafficking has become an increasing menace to our society." App. B, p. 18A. Proper concern for policy cannot mend the serious constitutional flaws in the Minnesota Statutes. This Court has acknowledged:

> [T]he need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would

> otherwise fail to meet constitutional standards for definiteness and clarity.

Kolender, 461 U.S. at 361. As this Court directs the Minnesota Appellate Courts may not step in and define what the Minnesota Legislature has failed to provide, proper due process.

CONCLUSION

This case presents the important question of a challenge to the constitutionality of State laws, Minn. Stat. §152.01, Subd. 18, definition of drug paraphernalia, and §152.093, criminal offense of possession with intent to deliver. The Statutes are void for vagueness under the Hoffman Estates test of this Court for failure to afford an ordinary citizen notice and failure to include explicit standards for law enforcement.

The decision of the Minnesota Appellate Courts in reversing the District Court which struck down the Statutes as unconstitutional conflicts with the decisions of the federal courts of appeals and other courts. The drug paraphernalia laws of other states upheld by the federal courts of appeals meet the

due process standards while the Minnesota Statutes are fatally defective.

This Court should grant the petition for certiorari to review the decision of the Minnesota Court of Appeals upholding the challenged Statutes, affirmed by the Minnesota Supreme Court denial of petition for review.

Dated this 8th day of August, 1989.

Respectfully submitted,

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Phone: 612/871-8456

No. _____

APPENDIX TO PETITIONER'S BRIEF

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ANN BROOKE CHRISTENSEN,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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LAW OFFICES
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Minneapolis, Minnesota 55404
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Counsel of Record for Petitioner

APPENDIX

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STATE OF MINNESOTA

IN SUPREME COURT

C1-88-2065

State of
Minnesota,

Appellant,

vs.

Ann Brooke
Christensen,

Respondent.

O R D E R

Based upon all files, records and proceedings herein.

IT IS HEREBY ORDERED that the petition of Ann Brooke Christensen for further review be, and the same is, denied.

Dated: 6-9-89

BY THE COURT:

/s/ Peter A. Popovich
Chief Justice

STATE OF MINNESOTA

IN COURT OF APPEALS

C1-88-2065

Hennepin County — Foley, Judge

State of Minnesota Appellant, v.	Hubert H. Humphrey, III Attorney General Louise T. Dobbe Spec. Assistant Attorney General 200 Ford Building 117 University Avenue St. Paul, MN 55155 Roger J. Fellows Assistant City Attorney City of Brooklyn Park 1100 First Bank Place West Minneapolis, MN 55402
Ann Brooke Christensen, Respondent,	Larry B. Leventhal Leventhal & Associates 420 Sexton Building 529 South Seventh Street Minneapolis, MN 55415 Randall D.B. Tigue Nicollet Avenue Prof. Bldg. 2620 Nicollet Avenue Minneapolis, MN 55408 (Attorney for Amicus Curiae Kawaljit

Bhatia)

Filed: May 9, 1989
Office of Appellate
Courts

S Y L L A B U S

The trial court erred in finding Minn. Stat. §§152.093 and 152.01, subd. 18 (1986) unconstitutional on their face and as applied due to vagueness.

Reversed and remanded.

Heard, considered and decided by Lansing, Presiding Judge, Foley, Judge, and Schumacher, Judge.

O P I N I O N

FOLEY, Judge

The state appeals from the trial court's dismissal of criminal charges due to its finding that the charging statute is unconstitutionally vague on its face and as applied. We reverse and remand.

FACTS

Respondent Ann Brooke Christensen was

charged with the misdemeanor offense of possessing drug paraphernalia for delivery in violation of Minn. Stat. §152.093 (1986), which provides:

> It is unlawful for any person knowingly or intentionally to deliver drug paraphernalia or knowingly or intentionally to possess or manufacture drug paraphernalia for delivery. Any violation of this section is a misdemeanor.

Drug paraphernalia is defined as

> all equipment, products, and materials of any kind, except those items used in conjunction with permitted uses of controlled substances under this chapter or the Uniform Controlled Substances Act, which are knowingly or intentionally used primarily in (1) manufacturing a controlled substance, (2) injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, (3) testing the strength, effectiveness, or purity of a controlled substance, or (4) enhancing the effect of a controlled substance.

Minn. Stat. §152.01, subd. 18 (1986).

The charge stems from her operation and ownership of a retail store in

Brooklyn Park. The store sells posters, tobacco, records, and items allegedly useful for ingestion of both legal and illegal substances. The establishment is a licensed tobacco retailer.

Pursuant to a warrant, police seized "cocaine kits" (a mirror, razor, spoon, vial, etc. in a small pouch) and other items. Christensen, who was not present during the seizure, was subsequently charged. The trial court granted Christensen's motion to dismiss the complaint due to the unconstitutional vagueness of Minn. Stat. §§152.093 and 152.01, subd. 18 on their face and as applied. The state appeals.

ISSUE

Are Minn. Stat. §§152.093 and 152.01, subd. 18 unconstitutionally vague on

their face and as applied? [1]

ANALYSIS

Construction of a statute is a question of law reviewable de novo by this court. Hibbing Education Association v. Public Employment Relations Board, 369 N.W.2d 527, 529 (Minn. 1985). Every legislative enactment comes to this court with a presumption in favor of its constitutionality. Bergmann v. City of Melrose, 420 N.W.2d 663, 667 (Minn. Ct. App. 1988). Christensen bore the burden of proving the statute unconstitutional beyond a reasonable doubt. Federal

---

[1]. The issue of vagueness was raised under both the state and federal constitutions. The trial court addressed the issue relying primarily on federal case law. Our analysis is also based on federal law; the result would be the same under Minnesota's Constitution. See State v. Gray, 413 N.W.2d 107 (Minn. 1987); State v. Murphy, 380 N.W.2d 107 (Minn. 1986); State v. Fuller, 374 N.W.2d 722 (Minn. 1985).

Distillers, Inc. v. State, 304 Minn. 28, 39, 229 N.W.2d 144, 154 (1975) (citing Minneapolis Federation of Teachers Local v. Obermeyer, 275 Minn. 347, 147 N.W.2d 358 (1966)).

In its memorandum, the trial court cited the applicable standard regarding vagueness from High Ol' Times, Inc. v. Busbee, 673 F.2d 1225 (11th Cir. 1982). However, it then relied extensively on the analysis used in an Oregon appellate court case. Gaffey v. Babb, 50 Or. Ap. 617, 624 P.2d 616, rev. denied 291 Or. 117, 631 P.2d 341 (1981). Gaffey relies on another case which was later reversed and the ordinance in issue was later upheld. See Gaffey, 50 Or. App. at 632, 624 P.2d at 625 (citing Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916 (6th Cir. 1980), vacated by 456 U.S. 968 (1982), ordinance upheld on appeal

after remand, 709 F.2d 534 (1983)).

Furthermore, the trial court's memorandum does not reflect consideration of Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982). We hold that Hoffman controls the decision here. Gaffey stands isolated, lacking any precedential value in the light of Record Revolution's remand due to Hoffman. Gaffey is likewise distinguishable on its facts; the language in the Oregon ordinance is different from that used in the Minnesota statute.

In Hoffman, a pre-enforcement facial challenge case, the Supreme Court upheld a village ordinance restricting sale of drug paraphernalia to those licensed by the city. Id. at 492. The ordinance made the sale of paraphernalia "designed or marketed for use with illegal cannabis

or drugs" unlawful. Id. at 506. The Court held that at least some of the items sold by Flipside (also a retail shop) were covered by the ordinance, and therefore the facial challenge was unavailing. Id. at 500.

To sustain a vagueness challenge

> the complainant must prove that the enactment is vague "'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' Such a provision simply has no core."

Hoffman, 455 U.S. at 495 n.7 (quoting Smith v. Goguen, 415 U.S. 566, 578 (1974) (citation omitted)) (emphasis is original); see also State v. Reynolds, 243 Minn. 196, 66 N.W.2d 886 (1954); State v. Moore, 431 N.W.2d 565, 567 (Minn. Ct. App. 1988).

> All the due process clause requires is fair notice by providing "an ascertainable

standard of guilt" sufficient to enable persons of ordinary intelligence to avoid conduct which the law forbids.

High Ol' Times, 673 F.2d at 1229 (citing Rose v. Locke, 423 U.S. 48, 50 (1975); Winters v. New York, 333 U.S. 507 (1948)). In its analysis, the Hoffman court relied on the standards for evaluating vagueness announced in Grayned v. City of Rockford, 408 U.S. 104 (1972):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-09 (footnotes omitted); see also State v. McCorvey, 262 Minn. 361, 114 N.W.2d 703 (1962); City of Mankato v. Fetchenhier, 363 N.W.2d 76 (Minn. Ct. App. 1985). The Court stated that less precise enactments are more likely to be tolerated in the civil context than in the criminal due to the differences in consequences of imprecision; in any event, absolute precision in drafting is not required. Hoffman, 455 U.S. at 499; see also High Ol' Times, 673 F.2d at 1229. Also, a "scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant." Hoffman, 455 U.S. at 499. The Hoffman opinion set "important limits on facial constitutional attacks in the drug paraphernalia area." Levas & Levas v. Village of Antioch, Illinois, 684 F.2d 446 (7th Cir. 1982).

> [A] finding of unconstitutional vagueness cannot be based on uncertainty at the margins, or on a parade of bizarre hypothetical cases: problems of that order can be resolved in challenges to the ordinance as applied.

Id. at 451.

Apply the above standards, the Hoffman Court determined that the phrase "designed * * * for use" used in the ordinance contained a scienter standard in that

> an item that is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer. A business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer.

Id. at 501 (emphasis added). The Hoffman Court also found that phrase "marketed for use" transparently clear in that "it describes a retailer's intentional display and marketing of merchandise." Id. at 502. "The standard requires

scienter, since a retailer could scarcely 'market' items 'for' a particular use without intending that use." Id. Here, Christensen's employee, a retial clerk, directed the police to the area where the paraphernalia was located when asked, "Where's the cocaine stuff?"

A number of other state and federal circuit court cases have been decided since Hoffman. Unlike Hoffman and High Ol' Times, many of the statutes/ordinances discussed in those cases were based directly on the Model Drug Paraphernalia Act. As a general proposition, most of the statutes/ordinances based on the Model Act were upheld; those not so based were struck down. See New England Accessories Trade Association v. Tierney, 691 F.2d 35 (1st Cir. 1982); Levas & Levas, 684 F.2d at 454; Record Head Corp. v. Sachen, 682

F.2d 672 (7th Cir. 1982); Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981), cert. denied 455 U.S. 1005 (1982); Philman's, Inc. v City of West Carrollton, 577 F.Supp. 1380 (S.D. Ohio 1983); see also Note, The constitutionality of Drug Paraphernalia Laws, 81 Colum. L. Rev. 581, 592-600 (1981). However, we hold that a statute need not be based on the Model Act to be found constitutional, it merely must meet the standard set forth in Hoffman.

Minnesota's statutes are, at best, only loosely based on the Model Act. Legislative history indicates that while the language of the Model Act was originally an amendment to Senate File 1758 (1982), the bill that was later enacted into law emerged from a joint subcommittee significantly altered. 1982 Minn. Laws ch. 609.

The trial court focused on and found that the language "used primarily" in Minn. Stat. §152.01, subd. 18 does not give the public and Christensen sufficient notice of criminal activity;

> Accordingly, under this definition of paraphernalia, the purveyer of any item, which is ultimately used with a controlled substance, has sold drug paraphernalia. Thus, no clear standard for the definition of paraphernalia is set forth in the statute to inform the defendant as to what conduct is prohibited. Defendant should not have to guess as to how an item will be used by a purchaser.
>
> The rationale used by the Oregon Court in Gaffey is most instructive in the instant case. * * * Gaffey explained: "* * * The number or type of items that could come within the purview of the ordinance is limited only by the use to which the ultimate consumer puts the item."

Upon a careful reading of the trial court's memorandum, we conclude the court found vague only that portion of the definitional statute which reads: "'Drug

paraphernalia' means all equipment * * * which are * * * used primarily * * *" in certain activities. Minn. Stat. §152.01, subd. 18. [2]

The trial court's holding imposes a more exact and precise standard than constitutional law requires. In our view, a person of ordinary intelligence would know what type of object is referred to in the statute, thus the statute provides the constitutionally required notice. Also, the statutes require the prosecution to prove the person charged (Christensen) knowingly or intentionally delivered drug paraphernalia, thus avoiding an improper prosecution due to the criminal intent of a retail purchaser. See Minn. Stat.

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2. We also note that although the trial court held the statute unconstitutional as applied in this situation, the holding in this regard was not substantiated by facts in the record.

§152.093. Inherent in the prosecution's burden is the requirement to prove a defendant knew or believed the object sold to be "drug paraphernalia." 10 Minnesota Practice, CRIM. JIG, 20.14 (1986). As we read the trial court's memorandum, the thrust is towards the intent of the retail purchaser: "Defendant should not have to guess as to how an item will be used by a purchaser."

The statutes could conceivably be more precise. however, when the statutes are read together, as they are intended to be, the law is "susceptible of an interpretation which supports its constitutionality, [therefore this] court must accord the law such meaning." High Ol' Times, 673 F.2d at 1229 (citing Screws v. United States, 325 U.S. 91, 98 (1945) (plurality opinion)); see also Minn. Stat. §645.17 (1986). Such

interpretation is allowed absent evidence of contravening legislative intent and specific statutory language. State v. Newstrom, 371 N.W.2d 525, 529 (Minn. 1985). Statutes should not be struck down due to hypertechnical interpretations. See United States v. Locke, 471 U.S. 84, 125 (1985); Wilson v. Westinghouse Electric Corp., 838 F.2d 286, 290 (8th Cir. 1988); McDuffee v. United States, 769 F.2d 492, 493 (8th Cir. 1985). This court has also considered the public policy behind the statutes; drug trafficking has become an increasing menace to our society.

The statutes also provide sufficient enforcement standards for law enforcement and the courts and thus satisfy the second prong of the Grayned test. Hoffman stated:

> In reviewing a business regulation for facial vagueness *

> * * the principal inquiry is whether the law affords fair warning of what is proscribed.

Id. at 503. Although Hoffman was a pre-enforcement challenge, the Court noted it would look to evidence of discriminatory enforcement. Id. Like Hoffman, here there is a lack of evidence indicating that the statute has been or will be discriminatorily enforced. Like Hoffman, we agree that if there is discriminatory enforcement in future applications of the law, there "will be time enough to consider any such problems when they arise." Id. at 504 (quoting Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 52 (1966)).

We reiterate that precise definition is not required in order to pass constitutional muster. That a violation (as here) is a misdemeanor rather than a felony does not change the standard.

> [R]egardless of the severity of a law's criminal sanction, a law regulating business behavior which does not restrict constitutionally protected conduct is not void for vagueness if it is sufficiently clear as applied to the conduct of the complaining party.

Garner v. White, 726 F.2d 1274, 1278 (8th Cir. 1984) (citations omitted). Under the statutes, a fact finder could reasonably find that the items seized are "products * * * which are knowingly or intentionally used primarily" in ingesting illegal substances. See Minn. Stat. §152.01, subd. 18.

Our decision in State v. Mercherson, _____ N.W.2d _____ (Minn. Ct. App. April 25, 1989), is distinguishable on its facts from this case and does not control decision here.

Supportive of our holding on the constitutional challenges is State v. Grover, _____ (Minn. March 17, 1989). We

adopt the language of the Minnesota Supreme Court in Grover, where the supreme court held that

> we have no difficulty in concluding that the statute in question is not unconstitutionally overbroad in the sense of sweeping too broadly, reaching a significant amount of constitutionally protected activity. See State v. Krawsky, 426 N.W.2d 875, 877-78 (Minn. 1988) (upholding against overbreadth and vagueness challenge statute making it a misdemeanor to interfere with a police officer in the performance of his duties).

Grover, _____ N.W.2d at _____.

D E C I S I O N

Minn. Stat. §§152.093 and 152.01, subd. 18 do not suffer from constitutional vagueness. We reverse and remand for trial.

Reverse and remanded.

4-27-89

/s/ Daniel F. Foley

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT
DIVISION II

State of Minnesota,	)	
Plaintiff,	)	ORDER
-vs-	)	
Ann Brooke Christensen,	)	File No. 2151901
Defendant.	)	

The above-entitled matter came duly on for hearing before the Honorable Sean J. Rice, one of the Judges of the above-named court, on the 22nd day of April, 1988, at the Brookdale Court Facility, on Motion of Defendant to dismiss the above charge.

Roger J. Fellows, Esq., Assistant Brooklyn Park City Attorney appeared as Counsel for and on behalf of the Plaintiff.

Larry B. Leventhal, Esq., appeared as Counsel for and on behalf of the Defendant.

The Court, being duly advised in the premises, and based upon all of the files, records and proceedings herein,

IT IS HEREBY ORDERED:

1. Defendant's Motion is granted and the charge is hereby dismissed. Minn. Stat. §§152.093 and 152.01, Subd. 18 are unconstitutionally vague on their face and as applied.

1. Let the attached memorandum be made a part of this Order.

Dated this 20th day of September, 1988.

BY THE COURT

/s/ Sean J. Rice
Sean J. Rice
Judge of District Court

M E M O R A N D U M

InZane is a retail store located within the Zane Shopping Center in Brooklyn Park at 7325 Zane Avenue North. The store's merchandise includes phonograph records, recorded tapes, posters, tobacco, smoking implements and jewelry. InZane is a licensed tobacco retailer for over the counter tobacco & snuff accessories.

In September, 1987, police officers of the Brooklyn Park Police Department, while executing a search warrant at InZane, seized 119 assorted leather kits and 108 assorted glass and metal tubes. The leather kits contain a mirror, a small bottle, a razor blade, a spoon, and a tubs.

The Defendant, Ann Brooke Christensen, was charged with "Possession of Drug Paraphernalia" under Minn. Stat.

§§152.093 and 152.01, Subd. 18.

The defendant moves the Court to dismiss the charge against her on the ground that Minn. Stat §152.093 and §152.01, Subd. 18, are vague on their face and as applied herein do not offer sufficient specification to provide public notice of prohibited conduct and thus violate the Due Process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Minnesota Constitution.

Minnesota Statute 152.093 provides: "It is unlawful for any person knowingly or intentionally to deliver drug paraphernalia or knowingly or intentionally to possess or manufacture drug paraphernalia for delivery. Any violation of this section is a misdemeanor."

Minnesota Statute 152.01, Subd. 18 provides:

> 'Drug paraphernalia' means all equipment, products, and materials of any kind, except those items used in conjunction with permitted uses of controlled substances under this chapter or the Uniform Controlled Substance Act, which are knowingly or intentionally used primarily in (1) manufacturing a controlled substance, (2) injecting, injesting, inhaling or otherwise introducing into the human body a controlled substance, (3) testing the strength, effectiveness, or purity of a controlled substance, or (4) enhancing the effect of a controlled substance.

The Eleventh Circuit of the United States Court of Appeals congently sets forth the applicable standard for a vagueness review in High Ol' Times, Inc. v. Busbee, 673 F. 2d 1225, 1229-1230, (1982):

> The United States Supreme Court established a two-tier test for evaluating vagueness in Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972): Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist

that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application.

408 U.S. at 108-09, 92 S.Ct. at 2298-99 (footnotes omitted). When a criminal statute is involved, '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Lanzetta v. New Jersey, 306 U.W. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed 888 (1939) (footnote omitted). Although the Constitution tolerates a lesser degree of vagueness in enactments with criminal rather than civil penalties, we recognize that absolute precision in drafting laws is not demanded. Flipside, ___ U.S. ___ at ___, 102 S.Ct. at 1193; Boyce Motor Lines, Inc. v. United States, 342 U.S. 337,

340, 72 S.Ct. 329, 330, 96 L.Ed. 367 (1952). All the due process clause requires is fair notice by providing 'an ascertainable standard of guilt' sufficient to enable persons of ordinary intelligence to avoid conduct which the law forbids. Rose v. Locke, 423 U.S. 48, 50, 96 S.Ct. 243, 244, 46 L.Ed.2d185 (1975); Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948).

[5,6] Furthermore, a court may cure a law's vagueness by statutory interpretations. The Supreme Court has held that the inclusion of a specific mens rea element may alleviate a law's vagueness with respect to providing fair notice to the accused that certain conduct is prohibited. Colautti v. Franklin, 439 U.S. 379, 395 & n.13, 99 S.Ct. 675, 685 & n.13, 58 L.Ed.2d 596 (1979); Screws v. United States, 325 U.S. 91, 101-03, 65 S.Ct. 1031, 1035-36, 89 L.Ed. 1495 (1943) (plurality opinion). Moreover, if a law is susceptible of an interpretation which supports its constitutionality, the court must accord the law such meaning Screws, 325 u.S. at 98, 65 S.Ct. at 1033.

This is a case of first impression in the state of Minnesota. In

deciding whether Minnesota's drug paraphernalia statute is vague, the Court must first determine whether a person of ordinary intelligence is given a reasonable opportunity to know what conduct is prohibited by the statutes in question. State v. Becker, 351 N.W.2d 923, 925 (Minn. 1984).

The portion of the statute under scrutiny challenged as being vague is the definition of "drug paraphernalia" set forth in Minn. Stat. 152.01, Subd. 18. Defendant argues that this statute is vague since the "used primarily" standard focuses on the intent or knowledge of the ultimate user of the paraphernalia and not the intent or knowledge of the defendant retailer of the paraphernalia.

In this case defendant is charged with criminal conduct based upon a presumed illicit use of a product held

for sale. Rather than focusing on what the defendant knows or intends, the statute attempts to define the criminal activity of a retailer as incident to the intent or knowledge of a third party.

Defendant urges that the court follow the decision in Gaffey v. Babb, 50 Or. App. 612, 624 P2d 616, (1981), where a drug paraphernalia ordinance was declared unconstitutional for vagueness.

The definition of drug paraphernalia in Gaffey is strikingly similar to that found in Minn. Stat. §152.01, Subd. 18. [1]

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[1] Section 1:
It shall be unlawful for any person to knowingly manufacture, deliver, or sell drug paraphernalia or to possess drug paraphernalia with the intent to manufacture, deliver, or sell drug paraphernalia.

Section 2:
For purposes of this ordinance:
(2) 'Drug paraphernalia' means any instrument, device, article, or contrivance used, or intended for use in

With respect to the definition of paraphernalia in the ordinance the Oregon Court determined that:

> The portion of the ordinance we find unconstitutional is the definition of "drug paraphernalia" in section 2(c) supra. The essence of that subsection defines "drug paraphernalia" in terms of the use of the instrument, device, article or contrivance. It is not the use to which it is put in the hands of the manufacturer or seller, but the use made of the item in the hands of the ultimate consumer.

Gaffey at 622.

Accordingly, under this definition of paraphernalia, the purveyer of any item, which is ultimately used with a controlled substance, has sold drug paraphernalia. Thus, no clear standard for the definition of paraphernalia is set forth in the statute

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injesting, smoking, administering, or preparing any controlled substance as defined in ORS 475.015.
Gaffey at 621

to inform the defendant as to what conduct is prohibited. Defendant should not have to guess as to how an item will be used by a purchaser.

The rationale used by the Oregon Court in Gaffey is most instructive in the instant case. With respect to vagueness, the Court in Gaffey explained:

> Both parties presented evidence by the testimony of persons who had established expertise in enforcement of drug use laws. The testimony indicated that there are myriad items that can be and are used by drug abusers. The range of items that could be considered drug paraphernalia is limited only by the ingenuity of illicit drug users. For example, the testimony indicates that several common household items or items available in the general range of retail stores have been adapted spontaneously as an aid in illegal drug preparation or ingestion. A common electrical alligator clip is often used to hold a marijuana cigarette in order that it may be consumed to its full extent. A pull tab from an aluminum beverage can has been used for the purpose of ingesting cocaine into the nostrils. A small pocket mirror and razor

blade is often used to separate powdered drugs such as heroin or cocaine into smaller proportions. Most of the items identified or described by the expert witnesses have dual uses; one use for which they were originally manufactured and a second use when adapted for illegal preparation or administration of controlled substances. The number or type of items that could come within the purview or the ordinance is limited only by the use to which the ultimate consumer puts the item. (emphasis added).

The city argues that the generality of the description can be cured by expert testimony at trial for violation of the ordinance.

The contention appears to be that recognized experts can determine if a particular item is used or intended for use in the illegal preparation or administration of drugs. By this method, the city argues, a judge or jury can be informed as to the character of the item that accused is charged with manufacturing, selling or delivering. The difficulty with that argument is that it is the antithesis of the requirement that a penal ordinance or statute inform the public and law enforcement personnel of the standard of conduct required. The ordinary citizen should not have to depend on the testimony

of an expert at trial to determine if his conduct is prohibited by the ordinance. The law enforcement agencies must also have standards of enforcement in order that enforcement of the ordinance will not be arbitrary or capricious. Expert testimony presented in the adversary setting of a trial does not provide standards for the persons whose conduct is sought to be regulated or the police charged with enforcement of the ordinance.

Gaffey at 622., . . . ,

The ordinance here challenged provides:

> "It shall be unlawful for any person to knowingly manufacture, deliver, or sell drug paraphernalia * * *" (Emphasis added.)

The knowledge by the person charged, that the item manufactured, delivered or sold is drug paraphernalia, adds little to the definition of what can be lawfully manufactured, delivered or sold. The items described as drug paraphernalia are much like the pencil and paper used to make gambling records. A person who possesses a pencil and paper with the knowledge they are going to be used to make gambling records is

not in violation of the statute. Once the gambling record is made with the possessor's knowledge, all the elements of the statute are supplied and the gambling records have no other use.

The knowledge requirement of this ordinance does not supply the missing standards to determine what is and is not included in the definition. A proprietor of a hardware store may offer alligator clips for sale fully aware that the clips are often used to smoke marijuana cigarettes in addition to their use in electrical repair.

A druggist may sell hand mirrors and razor blades or cigarette rolling papers with the knowledge that these items are used or intended for use by the consumer for illegal drug preparation or ingestion. A grocery store clerk may sell beverages in aluminum cans knowing that the pull tabs of the cans are used to injest cocaine into the nostrils. Applying the rationale of Yancey to uphold the statute would arguably make these merchants liable for prosecution. An item which has a legitimate as well as an illegal purpose, depending upon the use to which it is ultimately applied, does not change its character simply by the knowledge of the person manufacturing, selling or delivering it.

Gaffey at 623-624.

The definition of drug paraphernalia in Minn. Stat. §152.01, Subd. 18, fails to give a person of ordinary intelligence a reasonable opportunity to know what conduct is unlawful. The statute is unconstitutionally vague on its face and as applied.

The Court is mindful of its duty to interpret the statue, if possible, in a way which will result in a finding of constitutionality. High Ol' Times, 673 F.2d 1225, 1228 (1982).

Providing a clear definition of paraphernalia and proscribing citizens' conduct with respect thereto is strictly a legislative function.

The Court is urged by the city to follow rulings in other jurisdictions which would allow a saving construction

of this statute. However, this Court is not persuaded by these authorities since the statutes or ordinances construed contain language that substantially differs from that which is under consideration here.

Because the statute fails the first part of the vagueness test, there is no need to consider any other question.

S.J.R.

MINNESOTA STATUTES CONSTITUTING THE STATE'S DRUG PARAPHERNALIA ACT.

Minn. Stat. §152.01, subd. 18, Drug paraphernalia. "Drug paraphernalia" means all equipment, products, and materials of any kind, except those items used in conjunction with permitted uses of controlled substances under this chapter or the Uniform Controlled Substances Act, which are knowingly or intentionally used primarily in (1) manufacturing a controlled substance, (2) injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, (3) testing the strength, effectiveness, or purity of a controlled substance, or (4) enhancing the effect of a controlled substance.

Minn. Stat. §152.092. Possession of drug paraphernalia prohibited. It is unlawful for any person knowingly or intentionally to use or to possess drug paraphernalia. Any violation of this section is a petty misdemeanor.

Minn. Stat. §152.093. Manufacture of delivery of drug paraphernalia prohibited. It is unlawful for any person knowingly or intentionally to deliver drug paraphernalia or knowingly or intentionally to possess or manufacture drug paraphernalia for delivery. Any violation of this section is a misdemeanor.

Minn. Stat. §152.094. Delivery of drug paraphernalia to a minor prohibited. Any person 18 years of age or older who violates section 152.093 by knowingly or intentionally delivering drug paraphernalia to a person under 18 years of age who is at least three years younger is guilty of a gross misdemeanor.